UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNIVERSAL CITY STUDIOS, INC., Plaintiff, vs. NINTENDO CO., LTD., and NINTENDO OF AMERICA, INC., Defendants.	82 Civ 4251 (RWS) VOLUME II

Deposition of SIDNEY SHEINBERG, taken on behalf of Defendants at 333 South Grand Avenue, Los Angeles, California, commencing at 9:30 A.M., Friday, March 4, 1983, before Howard J. Coleman, CSR #766, Notary Public, pursuant to Stipulation.

A P P E A R A N C E S :

FOR PLAINTIFF:

TOWNLEY & UPDIKE
BY: DOUGLAS C. FAIRHURST, ESQ.
405 Lexington Avenue
New York, New York 10017

FOR DEFENDANTS:

MUDGE, ROSE, GUTHRIE & ALEXANDER
BY: JOHN J. KIRBY, JR., ESQ.
and
THOMAS G. GALLATIN, JR., ESQ.
20 Broad Street
New York, New York 10005

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the fact that there is a particular controversy on the subject. Maybe there is.

Q All right, thank you, Mr. Sheinberg.

You should assume that my questions have import. That is why my question did not ask you for dates. My question is, was there a period of time when Universal had no merchandising rights in King Kong because Paramount had exclusive rights to merchandise King Kong?

A The answer to that question would be maybe.

Q Okay. And you have said that your answer was based on provisions of Universal's contracts. Which Universal contract are you referring to?

A I didn't refer to any Universal contract. I said all of the contracts and all of the agreements. We all know that Universal got into the King Kong business by virtue of its position that it entered into an agreement at a given point with RKO.

Now from that point forth until this day, every contract and everything that transpired is relevant. We make no claim prior to the point of our agreement with RKO, the oral agreement which was the subject of the State lawsuit, I believe that it is referred to.

Whether or not there were periods of time that it should be construed that we suspended rights and permitted other people to exercise them, everything that flows from that period to the present is a subject of

interpretation of agreements and actions that transpired during that period of time, and I am totally incompetent to now remember, if I ever knew, those facts.

Q Let me ask you this: You and your counsel concluded that you wanted to supplement, change, correct your testimony beginning at page 31 when you were asked questions as to whether or not Universal had anyone assigned to merchandise rights in King Kong from January 1, 1970 to June 4, 1980.

Now, with the benefit of discussion you have had with your counsel in the months that have elapsed since the last session of your deposition, can you now answer the question as to whether anyone at Universal was responsible for merchandising King Kong during that time period?

A Yes, I am perfectly comfortable with the answer being the answer that I gave in my deposition as long as it's understood that I am not held to the specific dates because my recollection is that the original RKO agreement was only made in like 1975 or '76, so it's obviously absurd for me to answer a question that says who was responsible during a period of 1970 when we make no claim to have had any rights.

Q Mr. Sheinberg, let me show you a document which was marked for identification as Defendants' 32 in the first session of your deposition and which you identified

at that time as bearing your signature on page 10.

Let me ask you to examine that again and tell me if today you can identify that document.

A Well, this appears to be the agreement that was the so-called settlement agreement, isn't it?

Q I am asking you the question, Mr. Sheinberg.

A I have answered the question.

Q And you are identifying it as the settlement agreement?

MR. FAIRHURST: Well, it's been noted on it. "Settlement Agreement and Release." I don't know what else you can do.

Q BY MR. KIRBY: You are referring to this as the settlement agreement with RKO?

A That is what this appears to be.

Q Okay. Now, is this agreement the agreement you are referring to as indicating a starting point for Universal's rights or alleged rights to merchandise King Kong?

A Of course not.

Q All right. Prior to this document being signed on June 4, 1981, did Universal have any rights to merchandise King Kong?

A Yes. Universal's claim of rights derives from the agreement which Universal has maintained that it entered into originally with RKO. This settlement

agreement simply resolves a dispute between the parties that started shortly after that period of time, and I presume that some of this is probably recited within the settlement agreement.

Q Okay, that's fine. I take it when you refer to the agreement with RKO, you are referring to the agreement that became the subject of controversy in or about 1976 in which Universal claimed that RKO had entered into a contract with it to allow Universal to do a remake of KING KONG. Is that the agreement with RKO you are referring to?

A I don't like the way you characterize it as a "remake." That is the agreement that I am referring to, without accepting your characterization as to what the "remake" covered.

Q Please change the characterization any way you see fit.

A I am perfectly content to accept the fact that we are both talking about the same agreement that was an oral agreement that was made somewhere in 1974 or -5, as I recollect.

Q Now, I take it it is your position and your testimony this morning that from the date of that oral agreement Universal had the right to merchandise King Kong?

A That has consistently been our position.

Q Now, I ask you again: During the period from

the time of that agreement, I am going to leave the date open subject to confirmation from that prior lawsuit, from the date of that agreement, whether it be 1975 or 1976 or thereabouts, and the date of the agreement that you have in front of you, did Universal have the right to merchandise King Kong?

MR. FAIRHURST: I have to pose the same objection that I posed earlier to your question. Without actually sitting down and rereading every one of the documents relating to the King Kong litigation, you could not possibly answer that question in a meaningful way, and my objection stands to it.

The question is asking the witness, on the basis of his recollection and memory, to recite in substance the import of several contracts and the import of several court rulings.

THE WITNESS: Exactly so. What you are really asking me is to give you a one-line conclusion of law, because from what I had testified to is, from this date Universal asserted it acquired the rights.

Now there were settlement agreements, lawsuits, purchases from heirs, judgments and it's the sum total of all of those things that determine whether or not Universal had what rights when.

I can only tell you when I know we started this, but everything else I can't summarize in one

sentence and I don't want to make absurd claims.

Q BY MR. KIRBY: All right. Now, Mr. Sheinberg, during the period from this agreement with RKO, this oral agreement, until June 4, 1980, the agreement that you have in front of you that was marked Defendants' 32, as a matter of fact, did Universal merchandise King Kong?

A I will not add anything to the testimony I previously gave. I am, if anything, subtracting from it.

Q What I am trying to ascertain, Mr. Sheinberg, is what you are subtracting.

Read the question.

(Record read.)

MR. FAIRHURST: I have a suggestion, John, that may move that along. You can let the contracts speak for themselves, the contracts, the judgments, and put the question to the witness which I think would help you and help everyone else: "Mr. Sheinberg, when did Universal commence merchandising King Kong?"

And if he has knowledge on the subject, the witness is competent to answer. If he doesn't, he can say he doesn't know.

The contracts, the documents, the judgments, will then all speak for themselves. That's the simplest way of doing it because you are asking the witness for a fact and the fact is when did Universal commence merchandising King Kong properties. That is the fact.

The interpretation by the witness of what the agreements may say or what their import is, what the judgments say, what their import is is really a secondary matter.

You are here to get facts from the witness and the witness, if he is competent to testify, I'm sure he will testify, and if he doesn't know, he'll say he doesn't know.

MR. KIRBY: Thank you, Mr. Fairhurst.

Read the question again, please.

(Record read as follows:

"Now, Mr. Sheinberg, during the period from this agreement with RKO, this oral agreement, until June 4, 1980, the agreement that you have in front of you that was marked Defendants' 32, as a matter of fact, did Universal merchandise King Kong?")

THE WITNESS: I have nothing to add to the testimony that I previously gave. It's included in the deposition. I subtract from such testimony any implication that Universal necessarily had the rights to merchandise King Kong during some portion of that intervening period. I have nothing new to add.

Q BY MR. KIRBY: All right. Mr. Sheinberg, let me ask you to refer to that portion of your deposition in which you answered the question whether or not Universal

about King Kong, Donkey Kong or this lawsuit?

A No, not that I recall.

Q Have you had any discussions with him with respect to any commercial relationship between Coleco and Universal?

A I don't believe so.

Q Do you remember when you last spoke to Mr. Greenberg?

A I believe I last spoke to Mr. Greenberg at the Consumer Electronic show in Las Vegas, and I don't remember when that was.

Q Would it refresh your recollection if I said it was approximately the first two weeks in January of 1983?

A That's probably right.

Q Do you recall what you spoke to him about there?

A Nothing that could conceivably have any reference to this lawsuit.

Q Did you talk to him about any licensing arrangements between Coleco and Universal?

A No, not that I remember.

Q Did you talk to him about any properties that Universal had that Coleco might be interested in?

A No, not that I remember.

Q Mr. Sheinberg, what today is the status of the Universal project to produce a movie that you testified

earlier had the working title KING KONG --

MR. FAIRHURST: I don't believe he testified to "KING KONG."

MR. KIRBY: KID KONG, excuse me.

MR. FAIRHURST: "K-I-D."

THE WITNESS: I don't really know what the exact status is. The producer of the movie unfortunately had open heart surgery or some type of heart surgery, so he has been delayed, and I would imagine the movie has been delayed, but as I testified to earlier, subject to whatever delays are going on , we have every intention of making the movie which at the moment is called THE ILLEGITIMATE SON OF KING KONG.

Q BY MR. KIRBY: Prior to Mr. Lang's surgery, did you have any general knowledge of how far the project had progressed?

A My last recollection is that I read a partial treatment. I don't remember whether I read that partial treatment before or after the first part of this deposition. I had a meeting with Mr. Lang and the head of our theatrical motion picture group and we talked about some radical changes because I was disappointed in the material, and that is the last recollection I have of it.

Q Have you ever seen any story boards or any type of artistic or photographic depiction of proposed characters or scenes for the movie?

Q And who is Mr. Joe Di Muro?

A Joe Di Muro is an attorney who is presently a consultant to us and widely experienced in matters involving King Kong.

Q When you say "he is presently a consultant" to you, does that indicate that his status has changed?

A My belief which could be wrong is that his status is an "of counsel" type status. He is not a member of the law department. He retired some years ago and he functions on specific kinds of matters. He bears the taint of KING KONG along with me, since he was a participant in the original litigation.

Q Who is Mr. Weitzner?

A Mr. Weitzner at that time was the senior executive in the advertising and publicity area and probably Mr. Pennington's ultimate boss. He is no longer with us.

Q Mr. Gordon Armstrong?

A Mr. Gordon Armstrong is in charge of the promotion and publicity aspect of the advertising and probably a more immediate superior of Mr. Pennington's.

Q Who is Mr. Fred Skidmore?

A I don't know.

Q Mr. Frank Wright?

A I think those are both people in the publicity area. I don't know them.

Q All right. Thank you.

for identification. Mr. Sheinberg, you have previously identified this document; is that correct?

A Yes.

Q Would you look at paragraph 6 of this agreement and I ask you to look at the last two sentences of paragraph 6 specifically, although obviously you should read anything else you feel you would like to.

A Well, the first of that paragraph, where it says nothing should be construed as permitting Universal to duplicate or distribute in any media verbatim copies or excerpts, that is one sentence. Can you ask me questions sentence by sentence, because the second sentence is going to require me to read paragraph 7.

Q At the time you signed this agreement, were you aware that this provision was in it?

A Yes. I read this agreement before I signed it.

Q I am now asking you in light of this provision whether Universal at that time had the position that it could duplicate or distribute in any medium verbatim copies or excerpts from the 1930's motion picture?

A I can't answer that because there is a bit of a non sequitur in your question. There is a case holding that certain rights in connection with KING KONG are in the public domain. What I would understand this sentence to say is that nothing in this agreement permits us to

duplicate or distribute in any medium verbatim copies or excerpts. However, if in fact KING KONG, the film, is in the public domain - and I underline the word "if," because that gets into all of the legal questions about the judgment, is it a judgment, et cetera, et cetera, et cetera - it may be that Universal may have certain rights to duplicate and everybody may have, but my understanding always was that nothing deriving from the settlement agreement would give us such rights to duplicate that motion picture or verbatim copies thereof. That was my understanding.

Q All, right, thank you very much, Mr. Sheinberg.

A I'm always a little leary when people thank me, but go ahead.

Q I will withdraw my words of gratitude if that will make you less leary. I thank you for understanding your position on that.

Now, was it your position at the time this agreement was signed that while Universal didn't get any rights from their agreement with respect to verbatim copies or excerpts, it did nevertheless have such rights?

A It was not my position that we had such rights. I had no position on that subject and in point of fact, I think that you can make an argument that, based upon a lot of Universal's behavior, that Universal has proceeded with due respect to the fact that it may not have

such rights.

Q All right. And do I take it then that it is not Universal's position today that it has such rights?

A I don't assert or deny -- I reserve the right to take any position with respect to such rights and do not want to articulate such position. As far as I am concerned, that is a legal question which I am not qualified to answer.

Q At the time the lawsuit in this action was commenced, did Universal have a position on this subject?

A I don't know. I hasten to add, it's very cheap to have a position that you own the world. So what?

Q Mr. Sheinberg, would you now look at the last sentence of paragraph 6.

A I have.

Q And you said you wanted to look in conjunction with paragraph 6 at paragraph 7 which is referred to.

A Right.

Q Have you looked at paragraph 7?

A Yes.

Q Is this a license from RKO to Universal?

A I don't know.

Q Does today Universal have any licenses from RKO with respect to KING KONG?

A I have answered that, I think, in the past.

I am not going to have this marked because I think it either has been previously marked or there is no reason to mark it, to wit, a copy of the complaint in the action.

MR. FAIRHURST: Marking complaints in the action to me is silly.

Q BY MR. KIRBY: I will show you a copy of the complaint, Universal City Studios, Inc. versus Nintendo Company, Ltd., and Nintendo of America, Inc. which bears the stamped number 82 Civ 4259, Judge Sweet, and indicates that it was filed in the United States District Court on June 29, 1982.

Let me ask you, Mr. Sheinberg, have you ever seen this complaint before?

A I don't believe so.

Q Prior to the time of filing this complaint, was your authorization sought?

A Well, whether it was my authorization that was sought or whether it was my instigation that created it, I don't know -- I don't want to quarrel with that, but I accept responsibility for this complaint, either by approving it or by directing it.

Q Did you also direct when it should be filed?

A No.

Q Do you know why it was not --

A That is never the case in the case of a

injunction was made? I don't remember whether I was aware of it or not.

Q Let me ask you this: Was the subject ever discussed with you?

A It may have been. I may have asked the question.

Q Do you have any present recollection?

A Vague recollection of some discussion, but not much.

Q Did Mr. Hadle ever advise you that Coleco had requested that you not file a preliminary injunction?

A No. Against Nintendo?

A Against Nintendo.

A I don't know that that is the case.

Q So Mr. Hadle never advised you of that?

A Not that I remember. I wouldn't have been -- Coleco does not direct the affairs of Universal or MCA.

Q My question was whether or not he had advised you whether that had been requested.

A No, I'm sure that if we didn't seek an injunction, it was only because we believed we couldn't get one.

Q Were you familiar with the contents of this complaint prior to the time it was filed?

A I don't know what you mean by the "contents of the complaint."

A It sounds to me like you are saying I didn't intend to say "Black," but now I'm saying "Black." I don't really know what question you are asking, but I think I have answered every question you might ask on the subject.

Q No, you haven't.

A I haven't?

Q Let's try again.

A Okay.

Q Did you know at the time the complaint was filed whether Universal was going to assert a copyright interest in King Kong?

MR. FAIRHURST: I think that is precisely what the witness just testified to a few seconds ago when he said there was a specific area to which in general he knew what the nature of the lawsuit was about. The definition of the rights, whether they comprise copyrights or Section 43 Lanham Act rights or misappropriation under the common law of New York or misappropriation under the province of New South Wales, he didn't know, and what you are doing is asking him that question in a more specific manner as opposed to a general manner.

Q BY MR. KIRBY: Did you know, Mr. Sheinberg, whether at the time this lawsuit was filed Universal was asserting that it had any copyrights with respect to King Kong?

A I did not know then and I do not know now the characterization of the rights that Universal was then or is then asserting, but I have stated - and I think Mr. Fairhurst said this uniquely well - I have stated that I certainly knew the general area that this lawsuit was going to be based upon, but I did not then know and I do not know now whether we are relying upon such things as statutory copyrights, common law copyrights, trademarks, trade names, misappropriations, torts, God knows what all else, and I precisely did not want to concern myself with that degree of specificity.

Q Does Universal today assert that it owns the trade name "King Kong"?

A I think that question should be put to counsel.

Q I am asking you.

A I would have no answer on that subject. Whatever Universal asserts in its complaint, it asserts.

Q I am not asking you with respect to the complaint now.

A You asked me to explain the complaint to you.

Q Does Universal today assert that it owns the trade name "King Kong"?

A I don't know. Again I repeat -- if you ask me for my opinion, I will assert every possible claim. The answer to all your questions you are going to ask me

will be "Yes," but that is ridiculous because in the last analysis, what we assert is in the complaint.

Q Does Universal with respect to the rest of the world assert that it owns the trademark "King Kong"?

A You are now saying not under this complaint, but --

Q Not under this complaint.

MR. FAIRHURST: I think the question is improper because there has been no occasion before the house for Universal to assert something that doesn't exist yet.

THE WITNESS: Wait a minute. I am prepared to assert that.

Q BY MR. KIRBY: All right. Is that consistent with your statement that you will assert anything under the sun?

A Yes, because we are now going down a ridiculous line of questioning.

Q Is that consistent with your knowledge that Universal owns the trademark?

MR. FAIRHURST: I think he answered the question. He has answered it.

THE WITNESS: I have stated -- let me try to summarize it quickly for you and then you can ask any pieces of it you want. I have stated if there is anything that should have come through on all of these pages of deposition testimony that has been taken is that I consider

the subject of King Kong to be very complicated and that I make it my own personal practice and would urge all of my executives to solicit legal advice before coming to any judgments with respect to King Kong.

Now, having said that, I also believe that Universal, having fought these wars against RKO General, Dino De Laurentiis, et cetera, and having entered into these various settlement agreements and acquisition agreements with heirs and everything else, that we have acquired a vast bundle of rights, and I think those rights may or may not include each and every kind of enumerated right that you are going down the road to ask me.

Now, if you keep pinning me to the wall or if the guy across the street pins me to the wall, I will assert that right because I think that we are entitled to assert that right unless it's ridiculous. I would not assert the right in the sole ownership in the film, for example, because that is ridiculous. I know we do not own the film, the original film KING KONG, but if it has to do with such things as seem to be within the parameter of the rights I believe were acquired by us, I am going to assert those rights.

Now, beyond that, Universal's official position as distinguished from Sid Sheinberg's position is going to be that which on the advice of counsel we pursue and we don't pursue frivilous or dumb lawsuits.

Universal had?

A When Coleco asked what rights Universal had, if they did, and I think I previously testified that I wasn't a party to that, I am confident that Universal through Bob Hadle articulated in considerable detail the rights which Universal thought they had. If such a conversation took place with Nintendo - and it very well may have because now that I refreshed my recollection, I think there were conversations by some lawyer from Seattle who represented Nintendo in the litigation or the negotiation - I am sure that Mr. Hadle gave the same answers. I wasn't there and I can't testify to it, but I am sure he gave the same answers to Nintendo as he would give to Coleco. I don't think -- I can't imagine any other --

Q Do you know what he said?

A Do I know what he said?

Q Yes.

A No.

Q Since May of 1982, have you been party to any discussion where a third party has asked Universal what rights Universal had with respect to King Kong?

A I can't remember any such discussion that I was a party to.

Q Were you advised at any time --

A Oh, wait a minute. That's not accurate.

Q All right.

Q Mr. Sheinberg, my question is designed to encompass everything you have studied, learned, developed during the course of your nine years of experience with the King Kong property. My question called for a yes or no answer.

MR. FAIRHURST: It didn't call for a yes or no answer.

THE WITNESS: It called for a definition of rights.

MR. FAIRHURST: That's not fair, John.

MR. KIRBY: Read the question again.

THE WITNESS: He can't even find the question, much less read it.

(Record read as follows:

"Q Now, I am not asking you to sit down now and look through all the documents. I am asking you on the basis of the last nine years you have been involved with the King Kong property whether today you can tell me what rights in King Kong Universal owns. Yes or no?")

THE WITNESS: I will choose to answer no.

Q BY MR. KIRBY: Are you aware, Mr. Sheinberg, of whether or not Universal presently has any agreement with Atari with respect to King Kong?

A Universal does.

Q When was that agreement entered into?

Q And that lasted 20 seconds?

A Yes.

Q And you said, "Throw them out of the office"?

A Correct.

Q Is that all you know about the discussions with Ralston Purina?

A That's all I know.

Q Did Universal make a counteroffer?

A I don't believe Universal made a counteroffer. Universal, I believe, indicated that it would be amenable to entering into a covenant not to sue providing it involved a continuing royalty and providing it knew what the hell it was trafficking in, but since Universal wasn't even informed as to whether or not it was a cereal or dog food, it turned out to be a ridiculous conversation.

Q Was the covenant not to sue in the same form that Atari has entered into with Universal that Universal had in mind?

A Well, that question would be better put to Mr. Hadle. I would suspect so. I think we are going to develop a standard form of covenant not to sue that we plan on utilizing with licensees of Nintendo.

Q Has that been developed?

A No.

MR. KIRBY: Please mark as Defendants' Exhibit 59 for identification a letter from Mr. Fairhurst to Topps

duplicate or distribute in any medium verbatim copies or excerpts. However, if in fact KING KONG, the film, is in the public domain - and I underline the word "if," because that gets into all of the legal questions about the judgment, is it a judgment, et cetera, et cetera, et cetera - it may be that Universal may have certain rights to duplicate and everybody may have, but my understanding always was that nothing deriving from the settlement agreement would give us such rights to duplicate that motion picture or verbatim copies thereof. That was my understanding.

Q All, right, thank you very much, Mr. Sheinberg.

A I'm always a little leary when people thank me, but go ahead.

Q I will withdraw my words of gratitude if that will make you less leary. I thank you for understanding your position on that.

Now, was it your position at the time this agreement was signed that while Universal didn't get any rights from their agreement with respect to verbatim copies or excerpts, it did nevertheless have such rights?

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such rights.

Q All right. And do I take it then that it is not Universal's position today that it has such rights?

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Q At the time the lawsuit in this action was commenced, did Universal have a position on this subject?

A I don't know. I hasten to add, it's very cheap to have a position that you own the world. So what?

Q Mr. Sheinberg, would you now look at the last sentence of paragraph 6.

A I have.

Q And you said you wanted to look in conjunction with paragraph 6 at paragraph 7 which is referred to.

A Right.

Q Have you looked at paragraph 7?

A Yes.

Q Is this a license from RKO to Universal?

A I don't know.

Q Does today Universal have any licenses from RKO with respect to KING KONG?

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A Against Nintendo.

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